UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

August 30, 2001

Frank Michny
Regional Environmental Officer
Bureau of Reclamation
Mid-Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825

Re: NEPA Compliance for Long Term Renewal Contracts

Dear Mr. Michny:

Thank you for your detailed letter of July 9, 2001, in which you responded to EPA's comments on the Bureau of Reclamation's process for evaluating the impacts of proposed renewals of long term contracts for delivery of water from the Central Valley Project (CVP). Our comments were raised in our letter dated December 8, 2000, as well as in a meeting between our offices on June 5, 2001.

Our agencies have a long history of working on National Environmental Policy Act (NEPA) compliance activities for CVP's long term renewal contracts. That history includes the formal referral of the NEPA issues by EPA to the President's Council on Environmental Quality in 1989. Subsequent to that referral, we have collectively had to address the impact of the far-reaching Central Valley Project Improvement Act (CVPIA), with its mandate for a system-wide programmatic CVP EIS, as well as the emergence of the CALFED Bay Delta Program and its massive NEPA planning effort. Although EPA believes that we have made substantial progress in carrying out the intent of NEPA, we still find that our agencies differ on fundamental aspects of NEPA as applied to these contract renewals.

As you know, most of our ongoing disagreements turn on the Bureau's position that much of the renewal process is merely maintaining the "status quo," and that much of the proposed action is mandated by law so that it is a "nondiscretionary action." Therefore, under the Bureau's theory, NEPA compliance can be a somewhat truncated process. EPA, on the other hand, has taken the position that (a) given the changing circumstances in California, continued water deliveries under these contracts for the next 25 to 50 years may perpetuate and aggravate environmental degradation and constitutes an irretrievable commitment of resources requiring NEPA review, and (b) there is sufficient discretion in the contract terms that the decisions facing the Bureau cannot be characterized as merely administrative or nondiscretionary.

Rather than repeating our respective arguments in this letter, we direct you to our earlier letters. [See Letter from Acting General Counsel Yamada to Chairman Alan Hill, April 13, 1989 (attached).] In addition, we are enclosing a copy of a letter from the General Counsel of the Council on Environmental Quality to the U.S. Department of Justice. This letter discusses and rejects the "status quo" argument in the context of contract renewals, and follows up on the CEQ Opinion on the EPA referral that was published in the Federal Register on July 6, 1989. Although the intervening passage of the CVPIA renders some of the details irrelevant, we believe that the fundamental approach to NEPA compliance outlined in our referral and in the CEQ Opinion are still valid.

We will let the historical record speak for itself. Our purpose in responding to your letter is two-fold. First, we believe that your letter misstates the current status of the ongoing litigation over the contract renewals. Second, we would like to continue our discussion about the appropriate application of the NEPA "Tiering" approach to contract renewals.

Reliance on the Karleton Opinion

Our first concern about your recent letter is that it includes substantial reliance on the U.S. District Court opinion in the long-running NRDC v. Patterson case (Civ. No. S-88-1658). Given the subsequent history of that case at the Court of Appeals, we believe that such reliance is inappropriate.

As you know, the District Court opinion was appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit overruled the District Court on an unrelated issue (Endangered Species Act compliance), which mooted out the NEPA claims. Nevertheless, the Ninth Circuit had to revisit the NEPA claims when the plaintiffs moved for fees, and the Ninth Circuit issued an order granting fees to the plaintiffs. The order states that "[w]e agree with the NRDC that it is entitled to EAJA fees for the claims under Cal. Fish & Game Code [Section] 5937 and NEPA. With respect to these claims, the court does not find that the position of the federal defendants was substantially justified or that any special circumstances exist that would make an award on these claims unjust." Order Dated January 22, 1999 (copy attached). Subsequent to this Order, the Ninth Circuit issued a stay of the proceedings, without making any further consideration of the merits. Order Dated February 24, 1999 (copy attached). Ultimately, the parties settled the fees issues, eliminating the need for further Ninth Circuit action.

Our point in reviewing this litigation is simple: In light of the subsequent history, we do not believe that the District Court's NEPA findings in NRDC v. Patterson are a definitive guide for NEPA compliance on the long term renewal contracts.

Tiering NEPA Review of Long Term Renewal Contracts

Much of your July 9, 2001 letter deals (properly, we believe) with the broad question of how best to "tier off" of the massive CVPIA Programmatic EIS (PEIS) as the Bureau moves to execute district-by-district contracts. EPA strongly supports the idea of tiering, as described in 40 CFR Section 1502.20. Our concern, which we noted in our letter of December 8, 2000, is that

it is unclear how the Bureau came to the conclusion that two "unit level" EISs should be prepared (for the American River and for the San Luis Unit) as the lower tier documents, but that Environmental Assessments were sufficient for the remainder of the contracts. We recognize that the environmental impacts, as well as other impacts, can differ substantially between the various units, due to both physical features and institutional situations (such as delivery priorities and/or alternative water sources). These differences and their significance at the contracting unit level, however, are not clearly articulated in the Environmental Assessments.

In addition, we are concerned that certain issues are getting lost in the process of tiering from the PEIS. For example, water quality issues were not discussed at all in the PEIS, and should appropriately be picked up in the unit level analyses. However, in the Bureau's Environmental Assessments no water quality impacts were identified relative to the No-Action alternative. Given that the PEIS alternatives analysis, including the preferred alternative selected in the ROD, did not address this issue, there is no true basis of comparison for the site-specific analyses. Additionally, the PEIS identified groundwater impacts as a significant impact at the programmatic level, but failed to discuss possible mitigation measures as required in 40 CFR Section 1502.14. We believe that unit level analyses should remedy this shortcoming.

Finally, we understand that the Bureau is engaged in a number of different analyses of components of CVP planning and operations. For example, on the Westside of the San Joaquin Valley, the Bureau is engaged in developing an EIS on San Luis Unit Long Term Contract Renewals, another EIS on drainage options under the recently-filed Plan of Action, and the Westside Integrated Resources Planning effort examining water supply options in the same area. Although each of these individual efforts has merit, we are concerned (a) that the multiple analyses come together at some time to provide a comprehensive review, and (b) that binding decisions not be made until the analyses are completed.

Next Steps

We appreciate the substantial difficulties of meeting NEPA's analysis and public participation goals for a truly massive project like the CVP, especially in California's rapidly changing water management environment. It is, however, precisely that paramount CVP role and rapidly changing landscape that make the full evaluation and disclosure of environmental issues so critical. One need look only as far as the Klamath Basin to appreciate the potential problems for local economies and natural resources that can be caused by making long term water delivery commitments without full knowledge of environmental impacts. EPA strongly believes this evaluation needs to take place before the U.S. government makes the 25 to 50 year commitments envisioned in the long term renewal contracts.

We understand that some of the renewal contracts have already been executed (notably in

the Friant Unit). Nevertheless, a substantial number of contracts are still pending for various reasons. We urge the Bureau to take advantage of this hiatus to reevaluate its NEPA strategy, clearly define its rationale for pursuing certain EISs to the exclusion of others and assure that the tiering process results in a comprehensive, useful review of the environmental consequences of the proposed actions, as envisioned by NEPA. Please contact Lisa Hanf, Manager of our Federal Activities Office at 415-744-1584 if you have any questions or would like to discuss this matter.

Sincerely,

Joshua Baylson
Acting Deputy Director
Cross Media Division

Attachments:

Letter from Acting General Counsel Yamada to Chairman Alan Hill, April 13, 1989
Letter from General Counsel of the Council on Environmental Quality to the U.S. Department of Justice, October 26, 1989
Order Dated January 22, 1999
Order Dated February 24, 1999